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FRIENDS OF THE EEL RIVER AND CALIFORNIANS FOR ALTERNATIVES TO TOXICS v. NORTH COAST RAILROAD AUTHORITY AND BOARD OF DIRECTORS OF NORTH COAST RAILROAD AUTHORITY, et al., PLAINTIFFS' CONSOLIDATED RESPONSE TO BRIEFS OF AMICI CURIAE IN SUPPORT OF RESPONDENTS AND REAL PARTY IN INTEREST

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Case No. S222472

In the Supreme Court of the State of California

FRIENDS OF THE EEL RIVER AND CALIFORNIANS FOR ALTERNATIVES TO TOXICS,
Plaintiffs and Appellants,

vs.

NORTH COAST RAILROAD AUTHORITY AND BOARD OF DIRECTORS OF NORTH COAST RAILROAD AUTHORITY,
Defendants and Respondents,

NORTHWESTERN PACIFIC RAILROAD COMPANY,
Real Party in Interest and Respondent.

After a Decision by the Court of Appeal
First Appellate District, Division One, Case Nos. A139222, A139235

Appeal from Superior Court of the State of California for the County of Marin
Case Nos. CIV 1103605, CIV 1103591
The Honorable Roy Chernus, Presiding

PLAINTIFFS' CONSOLIDATED RESPONSE TO BRIEFS OF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND REAL PARTY IN INTEREST

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INTRODUCTION

The California High Speed Rail Authority ("HSRA") bases its preemption arguments on a misunderstanding. Congress did not give the Surface Transportation Board ("STB") "exclusive and plenary jurisdiction over railroad operations." The Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. §§ 10101-11908, does not provide a pervasive scheme of national railroad regulation or planning that bars state exercise of police powers to protect the health and the environment. To the contrary, Congress entered the railroad regulatory arena in 1887 for the limited purpose of bringing economic stability to an emergent industry, and every statutory revision over the following century was directed at the same objective – facilitating a competitive market. In continually adjusting the law to meet the economic concerns of the time, Congress has consistently preserved traditional state powers to protect public health, safety, and the environment, even when those powers incidentally affect railroad operations.

The STB has no jurisdiction over the North Coast Railroad Authority ("NCRA") project at issue here – the potential rehabilitation and reopening of a rail line shut down for safety reasons by another federal agency. NCRA did not apply for or receive STB approval to restore service and recommence operation on its existing line. The single action that the STB took (and had authority to take) was certifying Defendant Northwest

Pacific Railroad Company ("NWPCo") as qualified to become the line operator should NCRA's putative lease with NWPCo be consummated and the rail line reopened. The STB did not approve day-to-day "operations" on the line, as HSRA implies, when it granted NWPCo's operator status license application. Nor does the STB have statutory authority to pass judgment on the wisdom of California's investment decision to repair and reopen the line. The STB merely granted new operator status if and when the line returned to service.

The express language in the ICCTA does not preempt how a railroad decides whether to rehabilitate a line and bring it back into service, such as through the environmental review process NCRA used here. Instead, the ICCTA preempts only those other state and federal remedies "with respect to the regulation of rail transportation." The California Environmental Quality Act ("CEQA") does not target *railroad economics*, or even railroads, for regulation and thus does not intrude into that area in which the ICCTA forbids states to regulate. As is undisputed, CEQA is a law of general application, intended to inform California public agency decisionmaking. It requires disclosure of potential adverse environmental impacts from public agency project approvals and mitigation of those impacts where feasible. Similarly, state law remedies for NCRA's failure to comply with CEQA in connection with its repair and reopening project do not conflict with any STB-approved activities or ICCTA remedies.

CEQA is California's tool to hold politically accountable subsidiary public agencies and the officials who fund and administer agency assets and decisions. Under the *Nixon-Gregory* doctrine, absent a clear statement from Congress, federal law may not "trench on" how a state chooses to constitute itself as a sovereign political entity. HSRA's attempt to avoid the *Nixon* clear-statement rule by arguing that Congress intended that public railroads be treated the same as private railroads is unavailing. Without an unambiguous and explicit statement that Congress intended the ICCTA to preempt how states govern the decisionmaking process of public rail authorities, courts may not interpret the ICCTA to preempt how California determines the legitimacy and legal enforceability of decisions made by a subsidiary agency to conduct state-owned business.

Moreover, as market participants, both public and private entities are free to consider the environmental effects of capital investments they make. HSRA cannot cite any ICCTA provision that preempts such internal decisionmaking. Instead, to avoid the determination that NCRA was acting on behalf of the State, as a market participant, HSRA falls back on its fundamental misconception that Congress intended plenary regulation of the rail industry, notwithstanding the ICCTA's clear intent to largely deregulate the rail industry and allow the market to operate freely. HSRA is thus incorrect when it argues that California cannot act as a market

participant, or proprietor, when deciding how to lease and invest millions of dollars in rehabilitating a decrepit rail line.

Finally, HSRA argues that even if there are voluntary agreements not subject to ICCTA preemption, where those agreements impose an unreasonable burden on railroad operations, their terms are preempted. But HSRA fails to apply the rule to the facts here, where agreements provided state funding necessary to repair and reopen the rail line and to secure authorization from the co-owner of the line for NWPCo to act as the future operator. These agreements further demonstrate that CEQA is not preempted here.

ARGUMENT

I. The ICCTA Does Not Preempt California's Requirement that Adequate CEQA Review Precede NCRA's Line Repair Project.

A. HSRA's Preemption Argument Rests on the Faulty Assumption of STB Jurisdiction over NCRA's Project.

HSRA's brief hinges almost entirely on an erroneous premise – that the CEQA "project" at issue here "is subject to STB jurisdiction and regulation under the ICCTA." California High-Speed Rail Authority Amicus Brief in Support of Respondents at 5 ("HSRA:5").[1] According to

[1] *See also, e.g.*, HSRA:10 (contending that "*the public rail agency is subject to STB jurisdiction* and is operating a railroad in interstate commerce pursuant to a license from the STB"); 38 (claiming this case involves "section 10501(b) and *actions subject to the STB's exclusive jurisdiction and regulation*"); 40 (claiming NCRA is "engaged in interstate

HSRA, the STB's approval of NWPCo as a potential operator established STB jurisdiction and therefore the ICCTA's preemptive reach over NCRA's repair and reopening project. This premise is wrong.

The CEQA "project" for which the challenged EIR was prepared is NCRA's decision to repair and reopen the line. The EIR here was intended to inform NCRA's decision whether to move forward with rehabilitating a dilapidated railroad that another agency, the Federal Railroad Administration, shuttered years ago for safety reasons. *See* AR:9:4592 (Dec. 9, 1998).[2] The STB did not assert any jurisdiction over NCRA's process for deciding whether and how to reestablish service along the Russian River Division of the railroad. It merely certified lessee NWPCo as a potential future operator of the line "upon consummation of the transaction." AR:16:8117, 8207. That "transaction" included CEQA compliance and consent by the Sonoma-Marin Area Rail Transit District, co-owner of the rail line. AR:13:6731.

As discussed further below, the STB does not have authority over rehabilitation work on an existing line or any say in the process a private or

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commerce by railroad and *under the STB's exclusive jurisdiction*, and facing CEQA lawsuits"); 49 (implying NCRA is a "public rail agencies constructing or operating *rail lines under STB jurisdiction*").

[2] Citations to the Administrative Record and to Plaintiffs' Consolidated Appendix appear, respectively, as "AR:[volume]:[page]" and "App:[volume]:[tab]:[page]."

public railroad uses to decide whether to proceed with that work. Nor does the STB's approval of a change in operator status preempt California's ability to make an informed decision about state-funded, discretionary infrastructure projects merely because CEQA compliance may affect how repairs are conducted, may result in judicial review, or may convince the state not to go forward with the project at all.

Were HSRA's legal theory correct, the STB could dramatically expand its legislatively-limited jurisdiction and effectively commandeer taxpayer revenue to compel state action, even if California ultimately decided to forego the project for financial, environmental, or other reasons. As explained below, Congress did not grant such plenary authority to the STB, which is not surprising since HSRA's position here is inconsistent with the most basic tenets of federalism. *E.g.*, *Printz v. United States,* 521 U.S. 898 (1997).

B. The History of the ICCTA Reflects Evolving Congressional Concern About the Financial Viability of the Industry, Not an Intent to Preempt Traditional State Decisionmaking Authority.

HSRA's preemption analysis relies selectively on a statutory predecessor to the ICCTA – the Transportation Act of 1920 – but ignores the context in which Congress was legislating. The Transportation Act was designed to bolster the economic sustainability of the interstate rail transportation system as a whole. It did so by giving the federal

government more rate-setting authority and shielding interstate carriers from financially onerous state mandates to invest in capital-intensive new lines or operations for the benefit of local commerce. The Transportation Act was thus consistent with earlier and later versions of the law, all of which reflect Congress' focus on responding to the unstable economics of the rail industry – rapid expansion followed by contraction.[3]

In nearly 130 years of railroad legislating, Congress has never expressed an intent either to displace the states' ability to control their own public expenditures and decisionmaking processes or to preempt the exercise of traditional state police power protecting public health, safety, and the environment. Nor has Congress extended federal jurisdiction over repair work on existing lines. The ICCTA, in short, is not the all-pervasive federal regulatory regime that HSRA suggests. *See* Plaintiffs' Opening Brief at 17-22 ("OB:17-21"); Plaintiffs' Reply Brief at 3-4 ("RB:3-4").

[3] Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America's Infrastructure*, 95 Marq. L. Rev. 1151, 1152 (2012) ("Dempsey I") ("Congress [in 1887] instituted regulation under the ICC largely to protect the public from the monopolistic abuses of the railroads. Between 1920 and 1975, however, the goal of the national transportation policy shifted to protection of the transportation industry from . . . unconstrained competition.").

1. The Interstate Commerce Act of 1887

American railroads were originally chartered under state law and regulated pursuant to historic state police powers.[4] But early state efforts to curb monopolistic behavior and corruption in the rapidly-expanding rail industry proved largely ineffective.[5] After the U.S. Supreme Court struck down Illinois' ability to regulate freight rates on interstate routes, *St. Louis & Pac. Ry. Co. v. Illinois,* 118 U.S. 557 (1886) (finding regulation unconstitutional under the Commerce Clause), the federal government stepped into the economic regulation of railroads for the first time with adoption of the Interstate Commerce Act ("ICA") in 1887. The ICA outlawed rebates and pooling, forced railroads to publish rates, and ultimately required the new Interstate Commerce Commission ("Commission") to ensure that rail fees were "just and reasonable." Smith at 339-40; Dempsey II at 265; Hovenkamp at 1035.

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[4] Zachary Smith, *Tailor-Made: State Regulation at the Periphery of Federal Law*, 36 Transp. L.J. 335, 338 (2009) (citing James Ely, Jr. *Railroads and American Law* (2001)); Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 Yale L.J. 1017, 1034 n.90 (1988) (noting that the rail system was developed "largely by means of state initiative and almost exclusively under state control" and that "before 1887 federal regulation was virtually nonexistent").

[5] *See* James W. Ely, Jr., "*The Railroad System Has Burst Through State Limits": Railroads and Interstate Commerce, 1830-1920*, 55 Ark. L. Rev. 933 (2003) ("Ely"); Paul Stephen Dempsey, *Transportation: A Legal History*, 30 Transp. L.J. 235, 254-65 (2003) ("Dempsey II").)

In response to early, narrow judicial interpretations of the ICA, Congress conveyed increasing authority on the Commission over the next three decades to regulate interstate rail rates. Hovenkamp at 1035-44; Ely at 966-67; Dempsey I at 1163-64. The economic challenge facing regulators at the time was that "[m]onopoly railroads earned monopoly profits, while competing railroads were driven into bankruptcy." Hovenkamp at 1035-44 (explaining that "railroad interests seemed destined to be either filthy rich or perpetually broke"). Fierce competition in long-haul interstate markets drove rates down to the point where carriers often could not cover fixed costs, while state regulators tried to prevent monopoly rents on more profitable short-haul intrastate routes, where lack of competition allowed a greater return. *Id.* at 1049-55. The Supreme Court eventually recognized that this short-haul/long-haul problem threatened the long-term economic health of the rail industry, and allowed the federal government increasing leeway to address *intrastate* rates in connection with the Commission's supervision of *interstate* routes. Ely at 969-73.

2. The Transportation Act of 1920

These concerns moved Congress to enact the Transportation Act of 1920. Dempsey II at 272 ("After World War I, [federal] policy . . . shifted from one of protecting the public from the market abuses of the transportation industry to one of preserving a healthy economic

environment for common carriers."). Congress was concerned with "freeriding by the states," with state-imposed low rates for intrastate rail traffic threatening the overall financial viability of the industry. Ely at 976 (citing *R.R. Comm'n of Wisconsin v. Chicago, B. & Q. R. Co.*, 257 U.S. 563, 588 (1922)). To address this concern, the Transportation Act augmented the Commission's powers, conveying new authority to supervise the rail industry's issuance of securities and to regulate intrastate rates when they affected interstate commerce. Ely at 974; *Dayton-Goose Creek Ry. Co. v. United States*, 263 U.S. 456, 478 (1924).

Relevant here, the Transportation Act also provided "that no interstate carrier shall undertake the extension of its line of railroad or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation over such additional or extended line of railroad unless and until the Commission shall certify that public convenience present or future requires it, and that no carrier shall abandon all or any portion of its line or the operation of it without a similar certificate of approval." *R.R. Comm'n of Cal. v. S. Pac. Co.* 264 U.S. 331, 344 (1924) (discussing paragraphs 18 to 21 of section 402). This new statutory language did not provide plenary federal jurisdiction over rail operations, but instead targeted specific activities, and there is no evidence that Congress intended the Commission to engage in affirmative planning for a national rail system, or to oversee repairs of

existing rail lines. Rather, the narrow purpose of this new provision was "to prevent interstate carriers from incurring expense which will lessen their ability to perform well their interstate functions." *Id.* at 347.

By requiring federal authorization for *new* construction, expansion, and operation of rail lines, Congress intended both to prevent overbuilding of expensive infrastructure believed to threaten the industry's financial vitality and to bar "states from requiring carriers to provide service at a loss, a step which contradicted the national policy of building a strong rail system." Ely at 974-75. Despite extending federal authority over new and expanded lines, the Transportation Act did not give the Commission direct authority over *intrastate* rail rates and explicitly exempted "the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state" from the new federal certification requirement. *R.R. Comm'n of Cal.*, 264 U.S. at 345 (quoting paragraph 22 of section 402).

3. The Staggers Act of 1980

It was not until the Staggers Act of 1980 that Congress directly addressed state jurisdiction over intrastate routes, even as it simultaneously "began the substantial economic deregulation of the surface transportation industry and the whittling away of the size and scope of the [Commission]." H.R. Rep. No. 104-311, at 82 (1995). In response to new concerns about the industry's economic viability, the Staggers Act

"deregulated most railroad rates, legalized railroad shipping contracts, simplified abandonments, and stimulated an explosion of service and marketing alternatives." *Id.* at 91.

Even with this considerable statutory overhaul, states retained a role in economic regulation, albeit one constrained by federal oversight. The Staggers Act provided that "[a] State authority may only exercise jurisdiction over intrastate transportation provided by a rail carrier . . . if such State authority exercises such jurisdiction exclusively in accordance with the provisions of this subtitle." Pub. L. 96-448, § 214(b), 94 Stat. 1895 (1980) (formerly 49 U.S.C. § 11501(b)(1)). The statute required each state "exercising jurisdiction over intrastate rates, classifications, rules, and practices for intrastate transportation" to submit its "intrastate regulatory rate standards and procedures" to the Commission for review and certification. *Id.* (formerly 49 U.S.C. § 11501(b)(2)).

To effectuate these changes, the Staggers Act for the first time expressly preempted state economic regulation of railroads (rates, schedules, classifications, etc.) unless the Commission certified the state rules. This new preemption language, codified in section 10501(d), provided: "The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized to administer the standards and procedures of this title pursuant to this section and section 11501(b) of this title) over transportation by rail carriers, and the remedies provided in this

title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive." *Id*. (formerly 49 U.S.C. § 10501(d)). The Conference Report explained that this provision preempted only state financial regulation of the industry:

> The Conferees' intent is to ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals. Accordingly, the Act preempts state authority over rail rates, classifications, rules, and practices. States may only regulate in these areas if they are certified under the procedures of this section.
>
> The remedies available against rail carriers with respect to rail rates, classifications, rules and practices are exclusively those provided by the Interstate Commerce Act, as amended, and any other federal statutes which are not inconsistent with the Interstate Commerce Act. No state law or federal or state common law remedies are available.

H.R. Rep. No. 96-1430, at 106 (1980) (Conf. Rep.). The Staggers Act thus made clear that state legislatures and state courts could not regulate railroad economics, even on intrastate lines, without federal concurrence.

While the Staggers Act altered the federal-state balance with regard to economic regulation of railroad rates, it did not substantively change the provisions of the earlier Transportation Act governing federal supervision over new construction, extension, and abandonment of lines. Sections 10901 through 10906 of the Staggers Act merely recodified the requirement (from section 402, paragraphs 18-21) of the Transportation Act that federal approval was necessary for construction, extension, acquisition, operation,

and abandonment of *interstate* lines under the Commission's jurisdiction. (formerly 49 U.S.C. §§ 10901-06). And section 10907 reiterated (from section 402, paragraph 22 of the Transportation Act) that "[t]he Commission does not have authority under sections 10901–10906 of this title over . . . the construction, requisition, operation, abandonment or discontinuance of spur, industrial, team, switching or side tracks if the tracks are located, or intended to be located, entirely in one state." *Id.* (formerly 49 U.S.C. § 10907).

4. The ICCTA of 1995

With enactment of the ICCTA in 1995, Congress completed the economic deregulation that it began under the Staggers Act, further curtailing federal regulatory authority over the railroad industry. Under the ICCTA, the new STB, as successor to the Commission, now had jurisdiction over the economic regulation of both interstate and intrastate lines, and the statute simultaneously "extend[ed] exclusive Federal jurisdiction to matters relating to spur, industrial, team, switching or side tracks formerly reserved for State jurisdiction under former section 10907." H.R. Rep. No. 104-311, at 95. While the ICCTA extended federal licensing jurisdiction (for new construction, expansion, and abandonment of interstate lines and for acquisition or operation of an existing interstate line by a new carrier) to intrastate lines, it did not substantively change the limited breadth of that licensing jurisdiction.

The ICCTA included several conforming changes "to reflect the direct and complete pre-emption of State economic regulations of railroads." *Id.* These changes included:

(1) deleting the language of prior section 10501(b) regarding federal certification requirements for state rate-setting because state rate-setting was no longer allowed;

(2) moving the "jurisdiction" and "preemption" language of prior section 10501(d) into section 10501(b); and

(3) deleting prior section 10907 language that exempted the construction or extension of wholly intrastate rail lines from federal licensing certification and adding new language to revised section 10501(b) to clarify that "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, *even if the tracks are located, or intended to be located, entirely in one State*" in order to bring new intrastate infrastructure activities within the STB's certification jurisdiction.

49 U.S.C. § 10501(b)(2) (emphasis added); *see* H.R. Rep. No. 104-422, at 167 (1995) (Conf. Rep.) ("In light of the exclusive Federal authority over auxiliary tracks and facilities, this subject is integrated into the statement of general jurisdiction."); S. Rep. No. 104-176, at 6 (1995) ("The bill would also eliminate Federal certification and review procedures for State regulation of intrastate rail transportation.").

The House Conference Report on the ICCTA summarized the purpose of these conforming revisions, including the "construction" and "operation" language on which HSRA relies to argue incorrectly that the STB has plenary jurisdiction:

> The changes include extending exclusive Federal jurisdiction to matters relating to spur, industrial, team, switching or side tracks formerly reserved for State jurisdiction under former section 10907. The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of *occupying the entire field of economic regulation* of the interstate rail transportation system. Although States retain the police powers reserved by the Constitution, *the Federal scheme of economic regulation and deregulation* is intended to address and encompass all such regulation and to be completely exclusive.

H.R. Rep. No. 104-311, at 95-96 (emphasis added). Thus, Congress did not expand – or intend to expand – the scope of federal certification jurisdiction over new railroad infrastructure; it merely extended that limited jurisdiction to wholly intrastate activities that had previously been exempted in order to complete the economic deregulation of the rail industry.

This more complete historical context reveals the critical flaw in HSRA's preemption argument. In crafting the ICCTA and its predecessors, Congress was focused on the economic viability of the evolving railroad system, and its statutory response reflects concern about the destabilizing effect of state rate regulation and state-mandated overbuilding and expansion of rail lines. As it stands today, the ICCTA gives the STB carefully-circumscribed exclusive jurisdiction to (1) adjudicate complaints concerning discriminatory rates or practices by common carriers (49 U.S.C. § 11701) and (2) grant or deny licenses for specific infrastructure activities (new line construction, existing line extensions), change of operator status, and abandonment of existing lines (49 U.S.C. §§ 10901, 10903). There is

no evidence in the historic record that Congress even remotely intended to create a federal agency with plenary railroad regulatory or planning authority or to usurp a state's traditional ability to make decisions that protect public health and the environment.

C. The ICCTA Does Not Convey STB Jurisdiction Over the NCRA Rail Line Project or Expressly Preempt CEQA Compliance for the Project.

HSRA's preemption argument incorrectly elides two distinct ICCTA directives – one addressing STB "exclusive jurisdiction" and the other expressly preempting "remedies . . . with respect to regulation of rail transportation." As the plain language and structure of the ICCTA demonstrates, neither of these directives prevents California from requiring that NCRA's proposed repair and reopening project undergo adequate CEQA review or precludes citizens from ensuring that NCRA complies with that requirement.

1. The STB Lacks Jurisdiction Over NCRA's Proposed Repair Project.

Section 10501(b) provides "exclusive" STB "jurisdiction" over (1) "transportation of rail carriers, and the remedies [provided by the ICCTA] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers" and (2) "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side

tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. § 10501(b). As discussed above, this statutory language was intended to displace state financial regulation and infrastructure requirements that might undermine market competitiveness in the rail industry.[6]

The reach of STB's exclusive jurisdiction over construction and operational activities in subdivision (b)(2) is, in turn, defined and circumscribed by section 10901, which establishes procedures for "Authorizing construction and operation of railroad lines." Section 10901(a) provides that "[a] person may—(1) *construct an extension* to any of its railroad lines; (2) *construct an additional* railroad line; (3) provide transportation over, or by means of, an *extended or additional* railroad line; or (4) in the case of a person other than a rail carrier, *acquire* a railroad line *or acquire or operate* an *extended or additional* railroad line, only if the

[6] The STB's exclusive jurisdiction under subsection (b)(1) to adjudicate disputes over allegations of discriminatory rates and other practices is not at issue here. Chapter 111 of the ICCTA requires that common carriers operating a railroad provide (i) transportation services upon reasonable request, and (ii) nondiscriminatory access to terminal facilities, switch connections, and side tracks. 49 U.S.C. §§ 11101-11103. If it receives a complaint about a carrier's failure to comply with these obligations, the STB may begin an investigation and take appropriate action to compel compliance. *Id.* § 11701. The STB also may pursue civil penalties against a noncomplying rail carrier, and an injured party may seek money damages against the carrier in federal district court. *Id.* §§ 11702, 11704, 11901. Because subsection (b)(1) is not relevant here, Plaintiffs do not discuss it further.

Board issues a certificate authorizing such activity under subsection (c)." 49 U.S.C. § 10901(a) (emphasis added). STB has limited discretion in exercising this jurisdiction. It must issue a certificate authorizing these activities at the request of an applicant, "unless the Board finds that such activities are inconsistent with the public convenience and necessity." *Id.* § 10901(c).

Thus, consistent with the ICCTA's legislative history and Congress' statutory policy findings (*see* 49 U.S.C. § 10101), section 10501(b)(2)'s jurisdictional provisions and section 10901(a) work together to (1) prohibit states from regulating railroad rates or mandating *new* lines or service *extensions* and (2) prevent the STB from unduly impeding a railroad's business decision to move forward with new construction, acquisition, or operation of lines or facilities. The statute does *not* empower the STB, however, to compel a rail carrier to construct, acquire or operate a new line or extend an existing line. Nor does it authorize the STB to intrude on the business judgments and decisions of any railroad (private or public) concerning whether to undertake such activities.[7]

[7] Section 10903 of the ICCTA provides a somewhat more rigorous STB process in connection with potential abandonment of an existing line or discontinuance of service. A rail carrier must submit a detailed application identifying the service and labor impacts of the proposed abandonment or discontinuance, and the STB must grant the action if it "finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance." 49 U.S.C. § 10903(d). The rail line at

When it granted the change of operator request and authorized NWPCo to become the potential future carrier on the NCRA line, the STB was doing only that – qualifying a potential new operator. The STB's section 10901(a) licensing authority over new operators, new owners, and extensions of existing lines and construction of new lines is strictly reactive to carrier or other affected party applications. Like most licensing bodies, the STB may grant or deny a request for one of the enumerated activities in section 10901(a), in response to an application, but Congress did not charge the agency with affirmative responsibility or authority for directing such activities.

Most critical here, the STB does not have – and has never asserted – any section 10901(a) authority or statutory jurisdiction over the rehabilitation and repair work necessary to reopen the NCRA line. RB:13; *Lee's Summit, Mo. v. Surface Transp. Bd.,* 231 F.3d 39, 42 n.3 (D.C. Cir. 2000) (STB lacks jurisdiction over line rehabilitation); *Detroit/Wayne County Port Auth. v. I.C.C.*, 59 F.3d 1314, 1317-18 (D.C. Cir. 1995) (jurisdiction does not extend to improvements of existing track). As the STB itself has often explained, "Congress' purpose in enacting the

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issue here was shut down by federal order and can be reopened only at substantial cost to California taxpayers. The question of whether the line thereby has been or may be permanently "abandoned" is not before the Court in this case. Rather, it is a question for another day, should California decide not to resume operations and instead abandon the line.

Transportation Act of 1920 [was] to encourage railroads to maintain and improve existing services, thereby strengthening their common carrier abilities, before spending capital constructing a new line or extending an existing one to serve new customers." *Union Pac. R.R. Co.—Petition for Declaratory Order—Rehabilitation of Mo.-Kan.-Tex. R.R. Between Jude and Ogden Junction, Tex.*, FD No. 33611, 3 S.T.B. 646, 1998 WL 525587, at *3 (S.T.B. Aug. 19, 1998) (finding no STB jurisdiction over carrier's repair and reopening of an inactive existing line). Consistent with this purpose, "the construction of an extension to a rail line, or an additional rail line, is one that enables a carrier to penetrate or invade a new market" and therefore falls within section 10901, while the "rehabilitation and reactivation" of an existing line does not implicate such concerns and thus "does not come within the Board's section 10901 jurisdiction." *Id.* at *3-4 (citing *Tex. & Pac. v. Gulf, Colo. & Santa Fe Ry.*, 270 U.S. 266 (1926)).[8]

Even where, as here, the STB has approved a change in the owner and operator status of an existing line, "no STB authority is necessary when a carrier proposes to improve or relocate an existing line without extending

[8] *See also BNSF Ry.—Petition for Declaratory Order*, FD No. 35164, 2009 WL 1416468, at *8 (S.T.B. May 19, 2009); *City of Stafford, Tex. v. S. Pac. Transp. Co.*, FD No. 32395, 1994 WL 613381, at *8 (I.C.C. Oct. 28, 1994), *aff'd, City of Stafford v. ICC*, 69 F.3d 535 (5th Cir. 1995); *Denver & Rio Grande W.R.R.—Joint Constr. Project-Relocation Over Burlington N.R.R.*, FD 30733, 41 I.C.C.2d 95, 97, 1987 WL 97286, at *2 (I.C.C. Oct. 20, 1987).

the railroad's territory." *Swanson Rail Transfer, LB—Declaratory Order—Swanson Rail Yard Terminal*, FD No. 37354, 2011 WL 2356468, at *2-3 (S.T.B. June 13, 2011) (finding no STB jurisdiction over rehabilitation and reactivation of line that "will not take . . . rail service into any new territory or market" and noting that the new carrier had already obtained state environmental permits for the work). The STB's approval of NWPCo's application for a change in operator status is not, accordingly, a federal mandate to repair and reopen the line. Under the ICCTA "construction and operation" language on which HSRA's argument hinges, the STB could no more order NCRA to reopen its line than could the DMV order someone to drive whose license has been revoked.

Because no STB decision was required for NCRA's rehabilitation and reopening project, no federal environmental review was required for those activities. *E.g., Union Pac. R.R. Co.*, 1998 WL 525587, at *5. The STB's only consideration of environmental issues came in connection with its August 30, 2007, notice authorizing NWPCo as the qualified future carrier on the line once the lease transaction was consummated and "after repairs" were completed. AR:16:8207, 8540. In that notice, the STB concluded that NWPCo's "anticipated operations would be below the threshold requiring the Board's environmental review" in its governing regulations and therefore rejected Friends of the Eel River's appeal of that decision. *See* AR:16:8539-42. The STB never considered the

environmental impacts associated with the line repair and reopening project that is the subject of the challenged EIR because such activities fall outside of its jurisdiction.

HSRA's suggestion that the STB made a permitting decision or considered environmental review for the project and that "federal law provides avenues to challenge the decision" is, therefore, incorrect. HSRA:17-18. Because NCRA's line repair project does not involve construction, acquisition, or extension of a line under section 10901, or the abandonment or discontinuance of a line under section 10903, there is no federal authority over the project and no federal "remedy" available to Plaintiffs.[9]

The absence of STB jurisdiction over the NCRA repair and reopening project distinguishes this case from *Town of Atherton v. California High-Speed Rail Authority*, 228 Cal. App. 4th 314 (2014), where the STB asserted section 10901 licensing jurisdiction over the proposed construction of a new high-speed rail line, and the U.S. Department of Transportation prepared an elaborate Environmental Impact Statement ("EIS") pursuant to the National Environmental Policy Act to accompany

[9] True, the STB's decision to grant NWPCo's common carrier certification without any environmental review was subject to administrative challenge, and Plaintiff Friends of the Eel River, in fact, challenged it. AR:16:8281-8347. But there is no federal venue to challenge NCRA's environmental review for the repair project.

HSRA's EIR. The joint "programmatic" EIR/EIS and subsequent project-level EIR/EIS for each segment of the high-speed rail project collectively span thousands of pages and contain extensive analysis for construction and operation impacts associated the new line.

Here, by contrast, there is (and will be) no federal environmental review because NCRA's repair activities fall outside of the STB's jurisdiction. Unless the repair occurs, there is no "operation" on the line subject to STB jurisdiction. The proposed rehabilitation project, funded by California taxpayers, may have significant adverse environmental impacts. Under California law, NCRA must therefore complete an EIR that meaningfully discloses those impacts to the public and identifies mitigation that may lessen or avoid them. If the Court finds that CEQA is preempted here, there will be no state or federal environmental review of any kind completed for the next phase of potentially damaging repair work along the Eel River Division of the line.[10]

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[10] Specifically, the EIR at issue here concerns only the repair of the Russian River Division of the line, not that portion of the line that runs through the Eel River Canyon corridor. The dilapidated condition of that segment reveals the enormous amount of physical work – and attendant environmental impact – involved in any repair effort. *Hard Times on the Railroad: Eel River Canyon*, YouTube (May 26, 2009), https://www.youtube.com/watch?v=RhCjYNKXNvk.

Moreover, as a matter of law, whether any portion of the line is currently operating (legally or illegally) is irrelevant to the issue before this Court. The point in time relevant to this CEQA challenge is the date that the EIR

2. Section 10501(b) Does Not Expressly or Categorically Preempt CEQA.

Separate from its jurisdictional language, section 10501(b) also provides: "Except as otherwise provided in this part, the *remedies provided under this part with respect to regulation of rail transportation* are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b) (emphasis added). On its face, this provision does not "categorically preempt" state actions merely because they may incidentally affect operation of a rail line in some way. As Plaintiffs explained in their prior briefs, CEQA does not "regulate rail transportation" – it is a decisionmaking and political accountability tool – and thus does not fall within the ICCTA's express preemption clause. OB:14-27, 52-59; RB:3-12.

This Court's recent decision in *People ex rel. Harris v. Pac Anchor Transportation, Inc.*, 59 Cal. 4th 772 (2014), is instructive. There, the Court found that California's action to enforce state labor and insurance requirements through the Unfair Competition Law ("UCL") was not preempted by the Federal Aviation Administration Authorization Act ("FAAAA"), which expressly precludes states from enacting or enforcing "a law, regulation, or other provision having the force and effect of law

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was certified. At that time, the line was not operating. *See, e.g.*, App:14:104:3768 (NCRA will not permit the operation until the EIR is certified).

related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." *Id.* at 775. This preemption language was borrowed from the Airline Deregulation Act, which Congress adopted to prevent states from undoing federal efforts to deregulate the industry. *Id.* at 779; *Rowe v. New Hampshire Motor Transp. Ass'n,* 552 U.S. 364 (2008). Both this Court and the U.S. Supreme Court have noted that the preemption language of the ICCTA, enacted a year after the FAAAA, is quite similar. *Id*.

In *Pac Anchor*, the Attorney General (who represents HSRA here) argued that the FAAAA did not expressly preempt California's UCL claim because the underlying state laws on which it was based were not specifically "related to" price, route or service involving the "transportation of property." *Pac Anchor,* 59 Cal. 4th at 782-83. This Court agreed, finding no express preemption: "[H]ere the FAAAA embodies Congress's concerns about the regulation of motor carriers with respect to the transportation of property; a UCL action that is based on an alleged general violation of labor and employment laws does not implicate those concerns." *Id.* at 783. Likewise here, the ICCTA embodies congressional concern about remedies related to the regulation of rail transportation; a claim seeking to hold NCRA accountable for adequate environmental review under CEQA does not implicate those concerns.

HSRA argues that CEQA nonetheless constitutes a facially preempted "preclearance" requirement because, in its view, CEQA litigation: (1) "can prevent a public railroad from proceeding with an STB-authorized project" (HSRA:14) or "can be used to deny the public railroad the right to engage in activities the STB has authorized" (HSRA:16); and (2) "has the effect of regulating 'matters directly regulated by the Board – such as the construction, operation, and abandonment of rail lines.'" (HSRA:16).

Notably, these arguments do not constitute an "express preemption" defense, as HSRA suggests. The ICCTA's plain text and legislative history say nothing about "preclearance" requirements. Moreover, as a factual matter, the rail line rehabilitation work analyzed in the EIR is not, as explained above, "an STB-approved project." Most important, compliance with CEQA prior to commencing the repair project does not "regulate" rail transportation or in any way impinge upon the STB's exclusive jurisdiction to approve applications for new or extended lines, service, and operators.

HSRA at times claims that its express preemption argument is limited to CEQA's enforcement remedies and does not address whether CEQA is preempted in general. HSRA:9, n.3, 14-20. Yet in other places, HSRA claims that CEQA is preempted in its entirety. *See, e.g.*, HSRA:46-47 (agencies' obligation to "comply with CEQA's procedural and substantive mandates" for rail projects is contrary to the ICCTA's purpose),

49 (when applied to public rail agencies, "CEQA is effectively regulatory"), 52 (the ICCTA preempts state regulation of rail transportation).

The amicus brief that the Attorney General submitted on behalf of the California Environmental Protection Agency, et al. ("Resources Agencies"), on the other hand, observes that "CEQA is largely *procedural*, and its directives apply to *public agencies*." Resources Agencies Brief at 15 ("Agency:15"). The Resources Agencies thus recognize that the ICCTA does not expressly preempt CEQA's application to rail projects – i.e., that such an argument is "overbroad." Agency:15. Indeed, the Resources Agencies agree not only that CEQA is not preempted generally, but that California environmental laws adopted under the state's historic police powers, including enforcement remedies, often are not preempted. Agency:21-23.

The Resources Agencies attempt to soften the conflict between the Attorney General's two briefs by claiming that preemption somehow operates with greater force where judicial remedies are sought against public agencies that have a single purpose to own and operate a "federally-licensed railroad line." Agency:16. This argument ignores that the Attorney General and California environmental enforcement agencies – including some amici here – have brought judicial enforcement actions against NCRA for numerous violations of California environmental laws.

See App:8:77b:2027-51. Moreover, ICCTA preemption operates with less, not greater, force in situations involving public rail agencies' obligation to comply with California law. *See* Sections II-III.

The decision whether to proceed with rehabilitation and reopening of the line is wholly within the discretion of a California public agency. If a railroad (private or public) decides to undertake such a project, some facet of its future activities (line extension, new operator status, etc.) may require STB certification, and the STB's approval or denial of that certification may be subject to the ICCTA's exclusive remedies. But there are no federal "remedies" or "avenues to challenge" capital investment decisions outside of the STB's circumscribed jurisdiction. This lawsuit cannot possibly "have the effect of second-guessing fully considered decisions already made by the STB" (HSRA:18) because there were no such decisions.

D. There Is No Implied or "As Applied" Preemption of CEQA Compliance or Litigation in This Case.

In the alternative, HSRA argues that, even if section 10501(b) does not expressly preempt CEQA environmental review, Plaintiffs' enforcement of the law is preempted "as applied" because the potentially available judicial remedies "would have the effect of preventing or unreasonably interfering with railroad transportation." HSRA:18-19. This

is simply a different label for the "preclearance" argument, but Plaintiffs address it here again under the "implied preemption" test.

As a threshold matter, any "as applied" preemption analysis must be conducted on a case-by-case basis. The Resources Agencies make this point forcefully and repeatedly, explaining that the ICCTA generally does not preempt laws of general applicability enacted under the state's traditional police powers, and that the question of "whether ICCTA preempts any particular exercise of police powers by the Environmental Agencies must be determined on a case-by-case basis." Agency:23; *see generally* Agency:21-23. Here a trial was held. While Defendants raised a general preemption defense in their answers (App:15:110:4053, 115:4248), they failed to satisfy their factual burden to establish implied preemption. In briefing, they argued "categorical" and "facial" preemption, without proffering facts necessary for the "as-applied" fact-based analysis. *See* App:9:83:2328-31; *see also Franks Inv. Co. v. Union Pac. R.R. Co.*, 593 F.3d 404, 413, 415 (5th Cir. 2010).

Tellingly, the Attorney General recently obtained dismissal of a rail industry ICCTA preemption challenge to new state legislation imposing oil spill contingency plan and financial responsibility requirements on railroads transporting oil, arguing for a fact-based inquiry:

> ICCTA does *not* preempt all state regulation affecting rail transportation. . . . The question of whether a state regulation is permissible under ICCTA is inherently fact-intensive. . . . The Court

> must analyze each individual regulation to determine whether it is preempted by ICCTA, considering whether the regulations are reasonable, certain, and non-discriminatory.

Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss Complaint for Injunctive and Declaratory Relief at 14, *Ass'n of Am. R.Rs. v. Cal. Office of Spill Prevention and Response*, Case No. 2:14-cv-02354-TLN-CKD (E.D. Cal. Oct. 30, 2014).[11] Similarly here, Defendants identify no facts showing that this lawsuit "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (articulating the test for conflict preemption).

Even assuming Plaintiffs prevail and the court remands this matter to NCRA for further environmental review or the consideration of additional mitigation measures (and even assuming that NCRA decides to cancel the project), there is no implied or "as applied" preemption here. Implied "conflict pre-emption exists where 'compliance with both state and federal law is impossible,' or where 'the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"" *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015)

[11] *See* Exhibit A to Plaintiffs' Second Request for Judicial Notice.

(quoting *California v. ARC America Corp.*, 490 U.S. 93, 100, 101 (1989)).[12]

The U.S. Supreme Court in *Oneok* emphasized "the importance of considering the *target* at which the state law *aims* in determining whether that law is pre-empted." 135 S. Ct. at 1599. There, the Court held that a state antitrust lawsuit for false price reporting, wash trades, and anticompetitive collusive behavior was not preempted by the Federal Energy Regulatory Commission's jurisdiction over interstate natural gas rates, including federal authority to issue rules and regulations to prevent "any manipulative or deceptive device or contrivance" for interstate sales. *Id.* at 1598, 1603. In so holding, the Court emphasized that the target of the antitrust lawsuit (collusive retail rates) was properly actionable under a state law of general applicability, even though application of that law "might well raise pipelines' operating costs, and thus the costs of wholesale natural gas transportation." *Id.* at 1601.

[12] As Plaintiffs explained in their Opening Brief, the implied preemption test is not, as NCRA and now HSRA suggest, whether CEQA will "unreasonably interfere with" or "unduly burden" interstate rail transportation. OB:54 n.7. Those words are part of the test for determining whether a state action violates the Dormant Commerce Clause. Defendants have not raised a Dormant Commerce Clause defense here, nor could they. Similarly, given STB's limited jurisdiction (discussed above) and Congress' expressed intent to preserve state police powers, no party has argued "field" preemption here.

Similarly, after finding no express preemption under the FAAAA, this Court in *Pac Anchor* also rejected defendants' "as applied" preemption argument. 59 Cal. 4th at 784-87. That defense was based, in part, on the idea that a successful UCL suit would drive up the cost of doing business and thereby affect market forces. *Id.* at 785. The Court followed the lead of the U.S. Supreme Court in *Dan's City Used Car, Inc. v. Pelkey*, 133 S. Ct. 1769 (2013), which held that state law consumer protection claims were not within the "target at which [Congress] aimed" in the FAAAA; that target was "a State's direct substitution of its own governmental commands for competitive market forces." *Pac Anchor*, 59 Cal. 4th at 785 (quoting *Dan's City*). The ICCTA takes aim at the same target. As it did in *Pan Anchor*, therefore, this Court should read the ICCTA's preemption of remedies related to the economic regulation of rail transportation narrowly to accommodate state environmental laws of general applicability designed to inform public agencies, and the public, of a project's impacts before deciding on a course of action.

HSRA fails to address *Pac Anchor*, *Dan's City*, and *Oneok*, although these recent high court cases are directly relevant here. As was true for the generally applicable state law at issue in each of them, CEQA does not target rail transportation or stand as an obstacle to accomplishing Congress's intent to deregulate the rail industry and make the market more competitive. To the contrary, California's purchase of the failed North

Coast line and the proposed major rehabilitation project are efforts to make this railroad financially viable. But just as NCRA cannot, for example, operate the line in violation of California anti-fraud law or shield itself from state contract law merely because its business involves operation of a railroad, neither can NCRA – as a public agency – escape its environmental review obligations under CEQA by pretending that STB has "plenary" authority over the state's project to rehabilitate the line and reestablish service.

II. The *Nixon* Clear-Statement Rule Applies to California's Governance of Its Subdivision Rail Agencies.

Reading section 10501(b) to preempt CEQA here would run afoul of the clear-statement rule articulated in *Nixon v. Missouri Municipal League,* 541 U.S. 125 (2004), and *Gregory v. Ashcroft*, 501 U.S. 452 (1991). HSRA contends that *California v. Taylor,* 353 U.S. 553 (1957), and related cases carved out an exception to this precedent for public rail agencies. But there is no exception to the clear-statement doctrine in cases involving public rail agencies, and section 10501(b) does not contain unmistakably clear language preempting NRCA's obligation to comply with CEQA. For these reasons alone, this case is not preempted.

A. *Nixon* and *Gregory* Govern the Interpretation of Section 10501(b); They Are Not the Basis of a Tenth Amendment Challenge.

HSRA first misconstrues Plaintiffs' discussion of California's sovereign interest in self-governance and democratic accountability, as well as the relevance of *Nixon* and *Gregory*. Contrary to HSRA's assumption, Plaintiffs have not raised a constitutional challenge to section 10501(b)'s application here. HSRA:27-30. Rather, *Nixon* and *Gregory* establish a rule of statutory interpretation that requires an unmistakably clear statement from Congress before a court will read federal statutes, including section 10501(b), to interfere with California's arrangements for conducting its own governance. *Nixon*, 541 U.S. at 140.

Federalism concerns do, however, undergird the clear-statement doctrine. This rule "acknowledg[es] that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461. As *Gregory* explained, since the federal political process is the primary "protection of the States against intrusive exercises of Congress' Commerce Clause powers, [courts] must be *absolutely certain* that Congress intended such an exercise." *Id*. at 464 (emphasis added) (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)).

HSRA's discussion of the failed Tenth Amendment challenges in *Taylor* and *United States v. California*, 297 U.S. 175 (1936), as well as of

the evolution of the Supreme Court's Tenth Amendment jurisprudence, misses the point. HSRA:28-30. None of these cases, which predate *Nixon* and *Gregory*, involve the statutory interpretation issue presented here.[13]

B. The Clear-Statement Rule Does Not Make Exceptions for Cases Involving State Governance of Public Rail Agencies.

NCRA occupies two roles. It is a common carrier that has entered the rail market and is subject to federal rail regulations. *See Taylor*, 353 U.S. at 568. But NCRA also is a public agency created by the Legislature and bound by the public laws of this state, including CEQA. Gov't Code §§ 93000-93034.; *Mountain Lion Found. v. Fish & Game Comm'n,* 16 Cal. 4th 105, 112 (1997).

In *Gregory*, the Supreme Court recognized that the clear-statement requirement protects state laws that go "beyond an area traditionally regulated by the States" and are instead "most fundamental" to a state's character as a sovereign entity. *Gregory*, 501 U.S. at 460. *Gregory* held

[13] HSRA incorrectly suggests that the U.S. Supreme Court "rejected" the application of a clear-statement principle in *United States v. California*. HSRA:28. The Court actually evaluated a different cannon of construction: the presumption that a sovereign is not "bound by *its own* statute unless named." *United States v. California*, 297 U.S. at 186 (emphasis added); *see also Taylor*, 353 U.S. at 562 (discussing same). Unlike the clear-statement rule, this cannon does not require an "explicitly stated" congressional intent to bind "the enacting sovereign" (i.e., the U.S. government) when such intent can be fairly inferred from a statute. *United States v. California*, 297 U.S. at 186. By contrast, the clear statement rule articulated decades later in *Nixon* and *Gregory* focuses on whether Congress clearly intended to preempt state sovereign functions.

that courts must be certain Congress intended to infringe on such sovereign interests before reading a statute to "upset the usual constitutional balance of the federal and state powers." *Id*. at 460-61 (finding no unmistakably clear intent in a federal age discrimination statute to preempt state-adopted age limits for state judges). As the Court recognized in *Nixon*, a state's "chosen disposition of its own power" and control of a subsidiary agency are core sovereign interests. *Nixon*, 541 U.S. at 140-41; *see also City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 437 (2002) ("[w]hether and how" a state grants powers to its subdivisions "is a question central to state self-government"). This Court similarly has recognized that California's sovereign power encompasses control over its subdivisions. *See Cal. Redevelopment Ass'n v. Matosantos,* 53 Cal. 4th 231, 254-55 (2011) (quoting *Hunter v. Pittsburgh*, 207 U.S. 161, 178-79 (1907)) ("The number, nature and duration of the powers conferred upon [public agencies] . . . rests in the absolute discretion of the State"); *In re Sanitary Bd. of E. Fruitvale Sanitary Dist.*, 158 Cal. 453, 457 (1910) (same); *In re Pfahler*, 150 Cal. 71, 79 (1906) (same).

In *United States v. California* and *Taylor*, the Supreme Court did not address these core sovereign functions but instead found that, after entering the rail market, a state railroad could not operate in violation of federal law. Specifically, *United States v. California* held that the State Belt Railroad was not immune from enforcement of a federal statute requiring that rail

carriers use automatic couplers between railcars. 297 U.S. at 180, 184-86. The Court rejected the Belt Railroad's argument that its status as a state entity removed its obligation to comply with this congressional regulation of interstate rail. *Id*. at 183-86.

In *Taylor*, the Supreme Court considered the applicability of federal law to the Belt Railroad once more. The Court addressed a conflict between the Railway Labor Act, which granted collective bargaining rights to employees of rail carriers, and California civil service laws, which forbid such collective bargaining rights for state employees. *Taylor*, 353 U.S. at 559-60. Again the Belt Railroad argued that it was not bound by federal regulation of rail carriers, and again the Court rejected that argument. The Court held that, once California entered the interstate rail market, the "State may not prohibit the exercise of [labor] rights which the federal Acts protect." *Id*. at 560. Because California's labor law was directly hostile to the collective-bargaining rights guaranteed by the Railway Labor Act, state law had to give way. *Id*. at 560-61, 65-67; *see also United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 681 (1982) (requiring a public railroad to comply with the Railway Labor Act did not violate the Tenth Amendment because "operation of a railroad engaged in interstate commerce is not clearly an integral part of traditional state activities").

These cases – like other cases that HSRA relies on – stand for the limited proposition that state rail carriers must comply with federal rail

regulations governing the interstate rail market. *See, e.g., City of New Orleans v. Tex. & Pac. Ry. Co.*, 195 F.2d 887, 889 (5th Cir. 1952) (public railroad subject to federal law "so long as it engages in interstate and foreign commerce"). Contrary to HSRA's argument, however, these cases do not go further and preempt state statutes that are unrelated to federal rail regulation and that instead only govern public state and local entities generally.[14] *Cf. Pac Anchor*, 59 Cal. 4th at 783-84 (upholding California's generally-applicable unfair competition law that did not directly regulate matters covered by the FAAAA). There is no conflict between California's interests in making public rail authorities comply with CEQA and the holdings in *United States v. California* and *Taylor*.

Further, HSRA's preemption argument focuses exclusively on federal requirements applied to rail carriers, arguing that they displace state-law obligations that otherwise control California agencies. HSRA:30-34. Yet this exclusive focus on federal law conflicts with the analysis required by clear-statement precedent. "The Supreme Court has applied *Gregory* [by] focusing on the state functions necessarily affected by operation of the [federal] statute, and not exclusively on the actual conduct

[14] STB decisions addressing federal regulation of public railroads (HSRA:32-33) are also irrelevant. NCRA's obligation to comply with federal law is undisputed. To the extent that HSRA asks this Court to read these decisions as limiting California's sovereign authority over its subdivisions, the Court should decline to do so. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159, 172-74 (2001).

proscribed by Congress." *United States ex rel. Long v. SCS Bus. & Tech. Institute, Inc.*, 173 F.3d 870, 888 (D.C. Cir. 1999). This one-sided analysis leads HSRA to overlook the important sovereign interests that would be nullified by preemption in this case, and assumes a conflict between CEQA and Congress' power to regulate rail where none exists.

As previously explained, through CEQA, the Legislature established requirements for public-agency decisionmaking and accountability when agencies take actions that may cause significant environmental impacts. OB:29-32, 36; RB:18. CEQA is but one of many agency-governance and accountability statutes through which California exercises sovereign control over its subdivisions. *See Nixon*, 541 U.S. at 140-41; *see also* Gov't Code §§ 6250-6277 (California Public Records Act); §§ 11120-11132 (Bagley-Keene Act); §§ 54950-71132 (Brown Act); §§ 81000-91094 (Political Reform Act).

In fact, the sovereign interests that CEQA advances extend further than the self-governance principles that *Nixon* protected. California expresses its sovereignty through laws that reach the heart of representative government in this State. *Gregory*, 501 U.S. at 461; *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 40 Cal. 4th 239, 249, 256-59 (2006) (acknowledging that the Political Reform Act's regulation of electoral process furthers "a state interest that is beyond . . . commercial and regulatory interests"). This Court has held that CEQA's environmental

review process facilitates informed democracy by promoting agency accountability to the electorate. An EIR "is a document of accountability. If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees." *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 392 (1988); *see also Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Ass'n,* 42 Cal. 3d 929, 936 (1986) (the "privileged position" that the public holds in the CEQA process "is based . . . on notions of democratic decision-making"). Consequently, requiring an agency "to fully comply with the letter of [CEQA]," including its public disclosure provisions, facilitates "appropriate action come election day should a majority of the voters disagree" with an agency's decision. *People v. County of Kern,* 39 Cal. App. 3d 830, 842 (1974).

For these reasons, the sovereignty issues here reach further than those in *Nixon*. There, the state sovereignty at stake was limited to the state's authority to control its subsidiary agencies. CEQA serves a similar purpose, but because it is also an instrument that California selected to enhance political accountability in public decisionmaking, the clear-statement requirement operates with greater force here.

The facts in *Nixon* further demonstrate why preemption of CEQA is unavailable here. Like regulation of railways, regulation of the telecommunications industry falls well within Congress' commerce power. Unlike the STB's limited regulatory authority, however, Congress chose to give broad regulatory authority to the Federal Communications Commission. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984) (Congress gave the FCC "broad responsibilities to regulate all aspects of interstate communication"); *Freeman v. Burlington Broads., Inc.*, 204 F.3d 311, 320 (2d Cir. 2000) (recognizing "the FCC's broad authority" over telecommunications). Despite this broad federal authority over telecommunications, *Nixon* refused to uniformly apply, to both state and private telecommunication providers, Congress' prohibition on states restricting the "ability of any entity" to offer telecommunication services. *Nixon*, 541 U.S. at 140-41.

Moreover, *Nixon* resolved a much greater conflict between Missouri law and federal law than is alleged to exist between CEQA and the ICCTA. In *Nixon*, Missouri's law specifically targeted the subject matter of the Telecommunications Act's preemption clause – the entry of "an entity" (i.e., a municipality) into the telecommunications market. *Nixon*, 541 U.S. at 129. Nonetheless, the Court would not read that federal preemption clause to interfere with the state's control over telecommunication services offered by its subdivision. *Id*. at 140-41. Here, while ICCTA preemption

is limited to state regulation of rail transportation, CEQA does not target the railroad industry. As a law of general application, CEQA's effect on railroads is, at most, indirect and incidental. Compared with *Nixon*, it is even harder to find congressional intent to preempt how California controls public railroads through CEQA.

If a conflict did arise between California's exercise of its sovereign interests through CEQA and federal regulation in the ICCTA, *Nixon* and *Gregory* still require an unmistakably clear statement before the state's sovereign interest gives way. But HSRA, like Defendants, is unable to identify any ICCTA text or legislative history that clearly shows congressional intent to preempt state control of the decisionmaking processes of public rail agencies. The "context of section 10501(b)" (HSRA:34) does not suffice.

C. The Court Should Be Skeptical of Rail Agencies' Attempts to Shed the Legislature's and the People's Sovereign Control.

In enacting California's open-meeting laws, the Brown Act and the Bagley-Keene Act, the Legislature observed that the people of California "do not yield their sovereignty to the agencies that serve them." Gov't Code §§ 11120, 54950. To the contrary, "the people insist on remaining informed so that they may retain control over the [agencies] they have created." *Id.*

Though it is subject to the sovereign control of the Legislature and the electorate, HSRA purports to represent the views of "the State" regarding ICCTA preemption of CEQA. *See* HSRA:2. But HSRA is simply the agency that the Legislature created to pursue California's high speed rail project. *See* Cal. Pub. Util. Code §§ 185020-185511. HSRA does not speak for the State any more than other public agencies in California. *Cf. In re Pfahler*, 150 Cal. at 80 (defining "state" to encompass "the entire body of the people, who together form the body politic, known as the 'state'").

Indeed, the amicus briefs in this case reveal marked disagreement among California agencies regarding the ICCTA's preemptive reach. As a single-purpose rail agency, HSRA's desire for ICCTA preemption is understandably aligned with NCRA. But other agencies established by the Legislature recognize the impropriety of extending ICCTA preemption to this case. *See* Brief of Amici Curiae South Coast Air Quality Management District and Bay Area Air Quality Management District. Even the position taken by the California Environmental Protection Agency and the Natural Resources Agency is in tension with the position of HSRA and NCRA. *See* Section I.C.

As discussed, HSRA and NCRA must comply with numerous California laws (including CEQA) that apply only to public agencies in this state. Indeed, the Legislature has imposed specific obligations on HSRA.

See, e.g., Cal. Pub. Util. Code §§ 185033-185511 (requirements for submitting business plans to the Legislature); § 185033.5 (requirements for submitting project update reports to the Secretary of Transportation); § 185036.1 (requirement relating to purchasing California-made equipment). Rail agencies like HSRA and NCRA cannot, solely by virtue of their rail carrier status, disregard such directives from the Legislature and their ultimate responsibility to the people of California.

Because "preempting state or local governmental self-regulation (or regulation of political inferiors) would work so differently from preempting regulation of private players," *Nixon* found "it highly unlikely that Congress intended to set off on such uncertain adventures." *Nixon*, 541 U.S. at 126. The Court should be similarly skeptical of HSRA's and NCRA's attempt to shed their statutory obligations, and should preserve California's sovereign control over these subdivisions.

III. The ICCTA Does Not Preempt CEQA's Requirements Pertaining to State Proprietary Conduct.

In addition to the clear-statement doctrine, the market participant doctrine defeats preemption here. In authorizing HSRA and NCRA to use public funds and resources to pursue opportunities in the rail market, the State acted as a proprietor of public property. Under the market participant doctrine, courts presume that state and local requirements governing such market activities are not preempted unless Congress evidences contrary

intent. In *Atherton*, HSRA unsuccessfully argued against the market participant doctrine, contending that it does not save from ICCTA preemption CEQA's requirements for the State's proprietary rail projects. HSRA renews that failed argument here. But despite HSRA's contention, the market participant doctrine is both "available" in the context of ICCTA preemption and defeats any such preemption here.

A. The Market Participant Doctrine Applies to Preemption Under the ICCTA.

Some courts conduct a threshold inquiry to determine whether the market participant doctrine is available under a particular statutory scheme. They consider whether a statute "contains 'any express or implied indication by Congress'" that it intended to preempt state proprietary activities. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.,* 498 F.3d 1031, 1042 (9th Cir. 2007) (quoting *Bldg. & Constr. Trades Council v. Associated Builders & Contractors,* 507 U.S. 218, 231 (1993)) ("*Boston Harbor*")).

HSRA claims that *Atherton* was wrongly decided because it supposedly failed to undertake this analysis. HSRA:41. *Atherton*, however, recognized this threshold inquiry but found that HSRA impliedly conceded "that the [market participant] doctrine applies" to ICCTA preemption by expressly reserving HSRA's right to assert the doctrine in future ICCTA preemption cases. 228 Cal. App. 4th at 337 n.5.

HSRA now turns away from that earlier concession by arguing that the ICCTA will never accommodate the market participant doctrine. The ICCTA does not support HSRA's new position. The statute does not contain an express statement preempting states' proprietary decisions regarding rail transportation. Consequently, HSRA contends that the ICCTA impliedly preempts proprietary decisionmaking, arguing that applying the market participant doctrine here "would be contrary to both congressional and state intent." HSRA:40. HSRA is incorrect on both counts.

First, there is no "state intent" to remove either NCRA or HSRA from their respective obligations to comply with CEQA when carrying out State proprietary activities. The Legislature has never exempted these rail agencies from CEQA. *See* Cal. Gov't Code §§ 93000-93034 (lacking CEQA exemption for NCRA); Cal. Pub. Util. Code §§ 185000-185511 (lacking CEQA exemption for HSRA). Instead, the Legislature has repeatedly assumed that both agencies must comply with the Act. For instance, the Legislature appropriated over $60 million to NCRA under the State's Transportation Congestion Relief Program, which anticipates that funded agencies will comply with CEQA. Cal. Gov't Code §§ 14556.40(a)(32), 14556.13(b)(1) 14556.50(e), (i); *see also* App:9:84:2373 (Relief Program funding guidelines making recipient agencies responsible for "[c]omplying with all legal requirements . . . including . . . CEQA").

The Legislature likewise presented the Proposition 1A funding plan for the high-speed rail project to California's voters for approval, expecting that HSRA would continue to comply with CEQA. *Atherton*, 228 Cal. App. 4th at 338; *see also* Cal. Pub. Util. Code § 185033 (biennial business plans to the Legislature include the "expected schedule for completing environmental review . . . for each segment or combination of segments of Phase 1" of that project).

Nor did Congress, in enacting the ICCTA, impliedly preempt state proprietary activity in the rail market. HSRA primarily argues that applying the market participant doctrine here is contrary to the ICCTA's "preemption principles" and would defeat Congress's intent "to have uniform and exclusive federal regulation." HSRA:39-40. But this is not the correct threshold inquiry. Instead, courts consider only whether "Congress intended to extend the [federal statute's] reach to preempt state proprietary action." *Engine Mfrs.*, 498 F.3d at 1043. Nothing in the ICCTA implies that Congress intended to foreclose state proprietary activity in the rail market. Rather, numerous cases cited by HSRA acknowledge that public entities can enter the rail market, just like private entities. *See* HSRA:40.

Moreover, while HSRA acknowledges the *deregulatory* purpose of the ICCTA (HSRA:24-25), it fails to reconcile its "uniformity" argument with the largely-deregulated rail market. The goal of both the Staggers Act

and the ICCTA was to reduce federal regulation over interstate rail and encourage free market activity. *See* Section I; 49 U.S.C. § 10101(2) (statutory policy "to minimize the need for Federal regulatory control over the rail transportation system"). Deregulation allows both public and private entities to decide for themselves how to engage the rail market, and Congress likely expected that Burlington Northern, Union Pacific, and the State of California would make these decisions differently, not uniformly. Nothing in the ICCTA forecloses either private or state proprietors from setting their own criteria governing such decisions. *Cf. Tocher v. City of Santa Ana*, 219 F.3d 1040, 1048-50 (9th Cir. 2000) (upholding public market participation despite the FAAAA preemption clause intended to set national standards for conducting towing business), *abrogated on other grounds in City of Columbus*, 536 U.S. at 432.

Likewise, applying the market participant doctrine in ICCTA preemption cases does not intrude on the STB's limited jurisdiction. The STB never "specifically authorized" NCRA's repair activities here. HSRA:41; *see* Section I. Moreover, grants of federal regulatory jurisdiction do not by themselves demonstrate congressional intent to preempt state market behavior. *See Engine Mfrs.*, 498 F.3d at 1042-43 (market participant doctrine available despite EPA's regulatory jurisdiction under the Clean Air Act); *Atherton*, 228 Cal. App. 4th at 329-41 (applying the market participant doctrine to ICCTA preemption claim *after* the STB

exercised jurisdiction over the high-speed rail project). Thus, the ICCTA does not imply any congressional intent to preempt California's proprietary decisions in the rail market and foreclose the availability of the market participant doctrine.

B. NCRA's Obligation to Comply with CEQA When It Pursues Proprietary State Activity Is Not Preempted.

The market participant doctrine recognizes that public entities, like private entities, engage markets in numerous ways to pursue their unique interests. *See Boston Harbor*, 507 U.S. at 227. As Plaintiffs have explained, federal courts have adopted alternative tests to determine whether a particular state action falls within the market participant doctrine. *See* OB:39 (citing *Cardinal Towing v. City of Bedford, Tex.*, 180 F.3d 686 (5th Cir. 1999), and *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011 (9th Cir. 2010)). Here, the relevant test is whether the challenged state action reflects the state's "interest in its efficient procurement of needed goods and services, as measured *by comparison with the typical behavior of private parties in similar circumstances*." *Cardinal Towing*, 180 F.3d at 693 (emphasis added); *cf. Children's Hosp. & Med. Ctr. v. Bonta*, 97 Cal. App. 4th 740, 768 (2002) (declining to apply the market participant doctrine where there was "no genuine private market regarding the delivery of" healthcare at issue there).

HSRA echoes Defendants' argument that this test is not satisfied because "[o]nly public agencies must comply with CEQA's procedural and substantive mandates." HSRA:46-47. But that fact is irrelevant under the market participant doctrine. Numerous courts have upheld standards for proprietary actions that apply to public agencies but not private entities. *See White v. Mass. Council of Const. Emp'rs, Inc.*, 460 U.S. 204 (1983); *Engine Mfrs.*, 498 F.3d at 1045-46; *Tocher*, 219 F.3d at 1048-50; *Big Country Foods, Inc. v. Bd. of Educ. of Anchorage School Dist., Anchorage, Alaska*, 952 F.2d 1173, 1178-79 (9th Cir. 1992). There is no requirement that public and private proprietors act identically. *See Rancho Santiago*, 623 F.3d at 1026-28.

Moreover, "'efficient procurement' means procurement that serves the state's purposes – which may include purposes other than saving money – just as private entities serve their purposes by taking into account factors other than price." *Engine Mfrs.*, 498 F.3d at 1045-46. It is undisputed that private entities may, as part of their proprietary actions, embrace environmental standards in their decisionmaking processes. *Id*. at 1047 (citing private programs for procuring less-polluting vehicles]; *see also Servs. Emps. Int'l Union, Local 99 v. Options—A Child Care and Human Services Agency*, 200 Cal. App. 4th 869, 873, 877 (2011) (private childcare provider agreed to Brown Act compliance). Neither the parties nor amici have identified a provision in the ICCTA that would prevent such private

behavior. RB:23-24. Consequently, the ICCTA does not preempt CEQA's application to state proprietary actions, which serves California's purpose of considering and, where feasible, reducing the environmental impacts of public actions before resources are irretrievably committed to those endeavors. *Laurel Heights*, 47 Cal. 3d at 392.

C. Contrary to HSRA's Assertion, Market Participant Cases Protect from Preemption State Rules Governing Proprietary Activity.

HSRA contends that this case does not involve state proprietary conduct because "a public agency's actions to comply with CEQA, standing alone, are not market participation." HSRA:44. This argument misunderstands both CEQA and the market participant doctrine.

First, an agency's actions and obligation to comply with CEQA do not "stand alone." CEQA always applies to decisions regarding "discretionary projects proposed to be carried out or approved by public agencies." Cal. Pub. Res. Code § 21080(a). Relevant here, discretionary projects subject to CEQA include "actions undertaken by any public agency including but not limited to public works construction" and publicly-financed activities. Cal. Code Regs., tit. 14, § 15378(a)(1), (2). Thus, CEQA operates only in conjunction with discretionary agency actions to pursue the state's proprietary interests, including NCRA's discretionary actions to lease the rail line, fund line repair and rehabilitation, and carry out its project. *See* Agency:7-8 (stating same). HSRA is simply wrong to

claim that "*voluntary* action by [NCRA] making choices in a specific free market . . . [is] lacking in this case." HSRA:44.

HSRA's attempt to define NCRA as a separate proprietor "regulated" by CEQA does not change this analysis. HSRA:47-49. NCRA exists only as an agent of the State of California; it has no legally distinct status. *City of Columbus*, 536 U.S. at 425 (state subdivisions "are created as convenient agencies to exercise such of the State's powers as it chooses to entrust to them"). Under the market participant doctrine, it is irrelevant that "not only the state, but also some of its political subdivisions, are directed to take" actions. *Engine Mfrs.*, 498 F.3d at 1045-46; *Big Country Foods*, 952 F.2d at 1179 (9th Cir. 1992) ("A state should not be penalized for exercising its power through smaller, localized units; local control fosters both administrative efficiency and democratic governance."). NCRA's spending and contractual actions in furtherance of its statutory mission to own and operate the NWP line, including spending on major repairs to reopen the line and on an EIR to evaluate the impacts of that work, merely advance the state's proprietary interests. *See* AR:13:6796, 16:8080, 8572; Gov't Code § 93020 (empowering NCRA to "acquire, own, operate, and lease … property" to pursue its mission).

Second, the market participant doctrine does not support HSRA's attempt to sever CEQA and its enforcement mechanisms from state proprietary conduct. Rather, under the doctrine, courts evaluate the

standards that govern proprietary actions as a component of the larger state proprietary decisionmaking process. For instance, in *Engine Manufacturers*, plaintiffs argued that the Clean Air Act preempted "fleet rules" adopted by the South Coast Air Quality Management District, which set various environmental standards for vehicles purchased or leased by state or local agencies. 498 F.3d at 1036-37. In establishing these rules, the South Coast Air District did not itself procure goods in the marketplace. Rather, the District's rules set standards that "govern[ed] purchasing, procuring, leasing, and contracting for the use of vehicles by state and local governmental entities." *Id*. at 1045. The Ninth Circuit held that the environmental standards required for these proprietary actions ultimately reflected California's "interest in its efficient procurement of needed goods and services," and thus the rules were not preempted. *Id*. at 1048; *but see* 1049 (fleet rules that governed *private* purchases fell outside of the market participant doctrine).

Similarly, in *White v. Massachusetts Council of Construction Employers, Inc.*, the Supreme Court considered an as-applied challenge to an executive order setting workforce standards for construction projects financed by the city of Boston. 460 U.S. at 205-06, 209. The court held that "applying . . . the executive order to projects funded wholly with city funds" was protected under the market participant doctrine because "the Commerce Clause establishes no barrier to conditions" that govern the

market behavior of public entities. *Id*. at 209, 214-15. Other market participant cases employ the same method of analysis. *See Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794, 797-98, 809-10 (1976) (upholding statutes enacted to encourage market transactions for protecting Maryland's environment); *Tocher*, 219 F.3d 1040, 1048-49 (upholding ordinance authorizing the creation of "rules and regulations to guide [a city's] formation of contracts for towing services"); *Big Country Foods*, 952 F.2d at 1175 (upholding Alaska statute requiring school districts to pay more to purchase in-state milk).[15]

Thus, HSRA is incorrect that the focus of market-participant cases "is whether the particular challenged action or state law is its market participation" (HSRA:43), and that applying CEQA to the proprietary actions of public rail entities falls outside of the doctrine. HSRA:49. Like other market participant cases, applying CEQA to publicly-financed rail projects properly furthers the State's proprietary interest in ensuring that agencies consider environmental impacts when spending public resources on publicly-pursued projects. *Engine Mfrs.*, 498 F.3d 1031.

[15] In contrast, the market participant doctrine does not shield states' exercise of their spending powers to regulate private conduct in a manner that would interfere with the National Labor Relations Act. *Chamber of Commerce of U.S. v. Brown,* 554 U.S. 60 (2008); *Wis. Dept. of Indus., Labor and Human Relations v. Gould Inc.,* 475 U.S. 282, 287 (1986).

Nor does CEQA's citizen enforcement mechanism transform state requirements for proprietary action into preempted regulations. *Engine Manufactures* rejected an almost identical argument: "we do not see how action by a state or local government that is proprietary when enforced by one mechanism loses its proprietary character when enforced by some other mechanism." *Engine Mfrs.*, 498 F.3d at 1048 (upholding rules that contained enforcement mechanisms).

HSRA's attempts to distinguish this holding are unavailing. *See* HSRA:50. First, CEQA's codification in the Public Resources Code provides no meaningful basis for distinction. Just like CEQA, the vehicle emission rules in *Engine Manufacturers* were adopted separately from the proprietary behavior they governed. Nor did the Clean Air Act's preemption waiver for certain California air regulations dictate the outcome in *Engine Manufacturers*. *See* HSRA:51. The Ninth Circuit observed that there was "no contention that California has obtained a waiver for the [challenged] Fleet Rules." *Engine Mfrs.*, 498 F.3d at 1043 n.3.

For similar reasons, HSRA incorrectly suggests that the "unprecedented" posture of this case casts doubt on employing the market participant doctrine. HSRA:34-35. First, at least one non-California case has allowed plaintiffs to rely on the doctrine to defeat preemption as against public agencies. *See Elec. Contractors, Inc. v. Dept. of Edu.*, 303 Conn. 402, 449-54 (2012). Moreover, *Atherton* properly rejected HSRA's

argument, observing that "there is no authority supporting the argument that the power to 'invoke' the doctrine is reserved for [public agencies] to selectively assert in order to exempt those projects of [their] choosing from federal preemption." 228 Cal. App. 4th at 339 (it is "unusual to say the least" that a public agency was asserting federal preemption "instead of defending the application of state law"). As a question of law, the applicability of the market participant doctrine does not turn on the identity of the party that asserts it.

Ultimately, it is the purpose, not the form, of the state action that matters. *Tocher*, 219 F.3d at 1048-50. State statutes that are intended to regulate private behavior fall outside of the market participant doctrine.[16] For instance, the False Claims Act provisions in the *Grupp* cases regulated the conduct of a private entity, DHL, not the conduct of public entities. *See New York ex rel. Grupp v. DHL Express (USA), Inc.*, 19 N.Y.3d 278 (2012); *New York ex rel. Grupp v. DHL Express (USA), Inc.*, 922 N.Y.S.2d 888 (2011); *DHL Express (USA), Inc. v. Florida ex rel. Grupp*, 60 So.3d 426 (Fla. Dist. Ct. App. 2011). Similarly, the spending regulations in *Gould* and *Chamber of Commerce v. Brown* set standards for private

[16] HSRA mistakenly relies on *Whitten v. Vehicle Removal Corp.*, 56 S.W.3d 293 (Tex. Ct. App. 2001), HSRA:43, 50, which did not consider the market participant doctrine. *Whitten* found that Texas regulation of private tow operations was not covered by the "safety regulation exception" to preemption, which is unique to the FAAAA. 56 S.W.3d at 304-08.

individuals and entities that received public funds and contracts, purposefully regulating their behavior through the states' spending power. *Chamber of Commerce v. Brown*, 554 U.S. 60; *Gould*, 475 U.S. at 287.

In contrast, enactments that are intended to govern a public entity's proprietary actions – like the fleet rules upheld in *Engine Manufacturers*, the workforce standards applied in *White*, and CEQA here – are properly protected by the market participant doctrine.

IV. Defendants' Voluntary Agreements to Comply with CEQA Are Not Preempted.

HSRA does not dispute the general rule that voluntary agreements are not subject to preemption. HSRA:51-53; *see Flynn v. Burlington N. Santa Fe Corp.*, 98 F. Supp. 2d 1186, 1189 (E.D. Wash. 2000) ("no authority" under ICCTA for the proposition that a carrier is "precluded from voluntarily complying with local permitting regulations"). Rather, HSRA asserts that if specific facts show a voluntary agreement unreasonably interferes with railroad operations, the presumption against preemption may be rebutted. HSRA:53-54. HSRA offers only a theoretical argument without facts relevant to this case.

Here, there is no question that Defendants voluntarily agreed to comply with CEQA on numerous occasions. AR:9:4620-46 (Master Agreement with State); AR:13:6731 (Lease Agreement between NCRA and NWPCo); App:8:77b:2055, 2064, (2006 NWPCo Business Plan);

AR:17:8911 (Novato Consent Decree). Defendants also voluntarily agreed that the right to operate under the lease was subject to Sonoma-Marin Area Rail Transit District's consent, execution of equipment lease and tax approvals (AR:13:6731), and NWPCo's compliance with the State Consent Decree (AR:13:6746).

Moreover, as HSRA concedes, the question of unreasonable interference is a fact-based inquiry. HSRA:51. Defendants cannot possibly demonstrate that enforcement of CEQA interferes with interstate commerce. To the contrary, the facts here show unequivocally that CEQA compliance is a benefit, not a burden, because it was an integral element of the public funding to enable rail transport. OB:48-51. NCRA freely elected to receive over $31 million in state funds with conditions, including CEQA compliance, to start trains hauling freight in interstate commerce again. This public financial support was also critical to the NCRA partnership with NWPCo to reopen the line. *See, e.g.*, AR:13:6595, 6600-01, 6739, 6750.

Enabling commerce is the opposite of interfering with commerce. *See Mason & Dixon Lines Inc. v. Steudle*, 683 F.3d 289, 294 (6th Cir. 2012) (no dormant Commerce Clause violation when completion of state-funded road construction contract "encourage[s] the flow of commerce"); AR:17:8901-02 (in Novato Consent Decree, Defendants averring CEQA review is not "unreasonable burden on interstate commerce"). A contrary

interpretation is antithetical to the ICCTA's very purpose, which was enacted to allow railroads to be competitive against other modes of ground transportation.

As discussed, the only relevant transaction before the STB was a conveyance to NWPCo of NCRA's right to operate; the STB lacks jurisdiction over line rehabilitation, repair and maintenance. *See* Section I.C. Since NWPCo and NCRA had agreed in the lease to condition NWPCo's operation rights on NCRA's CEQA compliance, the STB could not have approved anything different from rights given by the lease. The STB could not approve rights NCRA did not have, including the right to proceed without CEQA compliance to which NCRA committed in the Master Agreement and its internal directive.[17]

Voluntary CEQA compliance here does not unreasonably burden railroad operations; in fact, the facts establish that CEQA compliance *facilitates* operations. As HSRA concedes, Defendants have the burden to establish facts that a voluntary agreement constitutes an unreasonable burden on railroad operations. *Wichita Terminal Ass'n, BNSF Ry. & Union*

[17] The STB acknowledged that NWPCo's right to operate was subject to conditions outside of its jurisdiction: "NWPCo. invoked the Board's authority to acquire the common carrier obligations and, *after repairs*, to conduct rail operations on the line." AR:16:8540 (emphasis added). Thus, the STB recognized that rail operations could occur after repairs, which under state law and the voluntary commitments of NCRA required CEQA review.

Pac. R.R. Co.— Petition for Declaratory Order, FD No. 35765, 2015 WL 3875937, at *7 (S.T.B. June 22, 2015) ("voluntary agreements between rail carriers and state or local entities are not enforceable under § 10501(b) where [ ] the *railroad demonstrates* that enforcement of its agreement would unreasonably interfere with the railroad's operations") (emphasis added). Because Defendants have never presented facts to rebut the presumption that the voluntary agreements benefit railroad operations, HSRA's reliance on *Woodbridge* is unavailing. *Twp. of Woodbridge v. Consol. Rail Corp., Inc.*, FD No. 42053, 2001 WL 283507, at *2-3 (S.T.B. Mar. 22, 2001). There is no onerous contract enforcement or law that unreasonably interferes with the line's operations. The STB's HSRA decision is not binding authority. *See Mullaney v. Woods,* 97 Cal. App. 3d 710, 719 (1979); RB:11-12. Moreover, the STB's notion that a "potential . . . effect" of CEQA compliance through a third-party enforcement action would be sufficient to preempt voluntary agreements, absent specific facts, contravenes well-established case law. *See Franks Inv. Co.*, 593 F.3d at 414-15.

CONCLUSION

The ICCTA reflects a century of congressional concern over economic regulation of railroads – such as unfair competition between rail carries, fair and non-discriminatory rates, and rail line expansions that might undo the rail industry. The statute is not intended to wrest state

decisionmaking from California's legislature or its people. Plaintiffs respectfully request that the Court reverse the Court of Appeal and remand the case with directions to rule on the merits of Plaintiffs' CEQA claims.

DATED: Aug. 26, 2015

Respectfully submitted,

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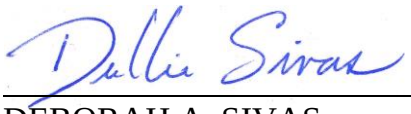
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.520(c)(1) of the California Rules of Court, I hereby certify that this brief contains 13,961 words, including footnotes, but excluding the tables of contents and authorities, signature block, and this certificate. I have relied on the word count of the Microsoft Word program used to prepare this Certificate.



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CERTIFICATE OF SERVICE

LYNDA F. JOHNSTON declares:

I am over the age of eighteen years and not a party to this action. My business address is 559 Nathan Abbott Way, Stanford, California 94305-8610.

On August 26, 2015, I served the foregoing **PLAINTIFFS' CONSOLIDATED RESPONSE TO BRIEFS OF AMICI CURIAE IN SUPPORT OF RESPONDENTS AND REAL PARTY IN INTEREST** on each person named below by placing a true and correct copy thereof in a sealed envelope, with postage thereon fully prepaid, in the United States Mail at Stanford, California, addressed to each recipient respectively as follows:

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed August 26, 2015 at Stanford, California.

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